ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review --	)	
Review of the Commission's Broadcast	)	MM Docket No. 98-35
Ownership Rules and Other Rules	)	
Adopted Pursuant to Section 202	)	
of the Telecommunications Act of 1996	)	

JOINT COMMENTS OF COX BROADCASTING, INC. AND MEDIA GENERAL, INC.

COX BROADCASTING, INC.

Werner K. Hartenberger
Christina H. Burrow

MEDIA GENERAL, INC.

John R. Feore, Jr.
Elizabeth A. McGeary

Their Attorneys

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

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SUMMARY

Today's media environment is staggeringly diverse. Consumers have a plethora of choices for information — audio, visual and print. The old paradigm of families across America gathering together to share the common experience of a network television or radio program has been transformed. Families now are able to watch different broadcast and cable networks on different household television receivers, read a newspaper or explore the Internet. The Commission must acknowledge the realities of today's marketplace as it examines the broadcast ownership rules. In so doing, the Commission must eliminate those rules that are no longer valid. The Joint Parties therefore urge the Commission to eliminate one rule for which the legal and factual foundation is long gone: the daily newspaper/broadcast cross-ownership rule.

When it adopted the daily newspaper/broadcast cross-ownership rule in 1975, the Commission found that newspaper owners were fit broadcast licensees. Nevertheless, saying that "51 voices are better than 50," the Commission adopted the rule in the hopes that it would increase local diversity of expression. The Supreme Court upheld the rule against First Amendment challenge because it found that the "physical scarcity" of broadcast spectrum permitted the Commission to restrict broadcasters' and newspaper owners' speech. But, it also follows that, since broadcast spectrum is no longer scarce and new media have exploded since 1995, there is no longer any basis for retaining the daily newspaper/broadcast cross-ownership rule.

As Commissioner Furchtgott-Roth noted in his Separate Statement at the initiation of the proceeding, the Commission asked the wrong questions in its *Notice*. There is no need to examine whether or how the retention or elimination of the daily newspaper/broadcast cross-ownership rule might affect "diversity and economic competition" since the underlying premise

of the rule is infirm. Instead, the Commission must, as part of this biennial review, examine whether the factual underpinnings of the spectrum scarcity doctrine remain valid in today's media environment. If the Commission is unable to show affirmatively that spectrum remains scarce, it cannot retain the daily newspaper/broadcast cross-ownership rule.

In its examination, the Commission must consider and address the criticisms made by numerous distinguished jurists and commentators against the spectrum scarcity doctrine. The Commission must explain how broadcast spectrum can still be considered scarce in a media environment where speakers, listeners and viewers have a multiplicity of media options available. The Commission also must explain how and why spectrum is different from other economic goods, particularly now that the Commission is no longer in the business of allocating television spectrum. Indeed, as Commissioners Powell and Furchtgott-Roth have pointed out, the Commission must explain how it can continue to retain regulations based on the scarcity doctrine when the Commission itself repudiated the doctrine over ten years ago.

First Amendment objections are not, however, the only objections the Commission must counter if it is to retain the daily newspaper/broadcast cross-ownership rule. The Commission also must explain why the rule does not violate the Equal Protection clause of the Constitution. Equal protection considerations demand a rational basis for differing treatment of substantially similar groups. The Commission must, therefore, explain why broadcasters and newspaper owners still are singled out for different treatment in a media environment where cable owners and DBS providers, for example, can own in-market newspapers.

If the Commission finds, as the Joint Parties believe it must, that the doctrine of spectrum scarcity is invalid, or that there is no rational basis upon which to continue to treat broadcasters

differently from other media, the Commission must promptly issue a Notice of Proposed Rulemaking to eliminate the daily newspaper/broadcast cross-ownership rule.

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> "The long and short of it is this: as matters now stand, the Commission has unequivocally repudiated spectrum scarcity as a factual matter."
>
> Joint Statement of Commissioners Powell and Furchtgott-Roth regarding the Personal Attack and Political Editorial Rules, June 22, 1998.

INTRODUCTION

Cox Broadcasting, Inc. and Media General, Inc. (the "Joint Commenters"), by their attorneys, file these comments in the Commission's proceeding undertaking its review of broadcast ownership rules.[1/] Although there are many areas where the Commission's broadcast ownership rules need reform, the Joint Commenters particularly direct their comments in this proceeding to the daily newspaper/broadcast cross-ownership rule.[2/]

1/ *See In the Matter of 1998 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Notice of Inquiry, MM Docket No. 98-35, FCC 98-37 (released March 13, 1998) (the *"Notice"*).

2/ 47 C.F.R. §73.3555(d).

The daily newspaper/broadcast cross-ownership rule must be abolished. "Spectrum scarcity" lies at the foundation of the daily newspaper/broadcast cross-ownership rule and, as Commissioners Powell and Furchtgott-Roth have noted, the spectrum scarcity rationale is legally and factually invalid. Since the rule was adopted in 1975 vast changes in media technology, including the advent of the Internet, have taken place, making retention of the rule inexcusable. Indeed, the Commission, which in other areas properly views itself as a champion for unleashing technology, must recognize that the daily newspaper/broadcast cross-ownership rule is a throw-back to a wholly different age. It is time for the Commission to acknowledge what broadcasters, jurists, the FCC and distinguished commentators have been saying for years: the theory of spectrum scarcity can no longer support FCC rules premised on the scarcity rationale.

Moreover, the equal protection clause of the U.S. Constitution demands that broadcasters receive equal treatment with other major players in the video industry and be permitted to own in-market newspapers. Similarly, newspaper owners must be permitted to own in-market broadcast stations. Equal protection demands that similar groups be treated similarly absent a rational basis to do otherwise. As no rational basis exists to treat broadcasters and newspaper owners differently from other major players in the media industry, the daily newspaper/broadcast cross-ownership restriction must be abolished.

In the recent *Tribune* case the D.C. Circuit stated that, if the FCC were faced with a rulemaking petition, the agency would be "arbitrary and capricious if it refused to reconsider [the daily newspaper/broadcast cross-ownership provision] in light of persuasive evidence that the

scarcity rationale is no longer tenable."[3/] The Joint Commenters urge the Commission to heed the *Tribune* Court's admonishment by revisiting the spectrum scarcity rationale and eliminating the daily newspaper/broadcast cross-ownership rule.

I. BROADCAST SPECTRUM "SCARCITY" NO LONGER PROVIDES A RATIONALE FOR THE DAILY NEWSPAPER/BROADCAST CROSS-OWNERSHIP RESTRICTION.

In the 20 years since the U.S. Supreme Court affirmed the daily newspaper/broadcast cross-ownership rule, spectrum scarcity repeatedly has been criticized and discredited by distinguished and knowledgeable jurists and scholars. The current *Notice* fails to acknowledge that criticism and, in doing so, ignores the past 20 years of broadcast jurisprudence.[4/] Instead of asking questions regarding the viability of the scarcity doctrine, as Commissioner Furchtgott-

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3/ *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998) (*"Tribune"*). The Joint Commenters note that a *Petition for Rulemaking* to eliminate the daily newspaper/broadcast cross-ownership provision has been pending for over a year. *See* Newspaper Association of America, *Petition for Rulemaking In the Matter of Amendment of Section 73.3555 of the Commission's Rules to Eliminate Restrictions on Newspaper/Broadcast Cross-Ownership* (filed April 28, 1997) (*"NAA Petition"*). *See also Notice* at ¶ 30. The Joint Commenters support the *NAA Petition*.

4/ Two Commissioners have made strong public statements about scarcity since the *Notice* was released that recognize the pivotal role scarcity plays in justifying the Commission's use of its regulatory authority. *See* Commissioner Michael K. Powell, "Willful Denial and First Amendment Jurisprudence," Remarks before the Media Institute (April 22, 1998) ("Powell Speech"); Commissioner Gloria Tristani, "Broadcast Views," Address to the Federal Communications Bar Association, (May 21, 1998) ("Tristani Speech"). Scarcity also was a central issue in the Commissioners' statements on the personal attack and political editorial rules. *See Joint Statement of Commissioner Susan Ness and Commissioner Gloria Tristani Concerning the Political Editorial and Personal Attack Rules*, Gen. Docket No. 83-484, FCC 98-126 (released June 22, 1998) ("Ness/Tristani Statement"); *Joint Statement of Commissioners Powell and Furchtgott-Roth, Commission Proceeding Regarding the Personal Attack and Political Editorial Rules*, Gen. Docket No. 83-484, FCC 98-126 (released June 22, 1998) ("Powell/Furchtgott-Roth Statement").

Roth urges,[5] the *Notice* solicits comment on whether the Commission's broadcast ownership restrictions continue to be in the public interest as those restrictions "traditionally" were defined in terms of "competition and diversity goals."[6] An assessment of those policy goals, however, serves no purpose unless the Commission has affirmed the continuing validity of the underlying assumption of spectrum scarcity. Indeed, the daily newspaper/broadcast cross-ownership restriction will have no foundation absent Commission reaffirmation of the scarcity rationale. If the foundation for the rule is gone, the Commission can never reach the questions on "competition" and "diversity" asked in the *Notice.*

A. The Daily Newspaper/Broadcast Cross-Ownership Restriction Is Based on the Concept of Spectrum Scarcity.

The daily newspaper/broadcast cross-ownership rule was adopted in 1975 along with a number of other broadcast ownership restrictions.[7] The rule was adopted to "add to local diversity" by preventing further common ownership of daily newspapers and broadcast outlets.[8] The Commission found that broadcast licensees who also owned newspapers had been

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5/ *Notice,* Separate Statement of Comm. Furchtgott-Roth at 1 ("Many, if not most, of the rules under review in this proceeding are based upon a theory well known to those in the communications world: the "spectrum scarcity" rationale. I believe the Commission is obliged to review the factual underpinnings of this fifty-five year-old rationale to see whether they hold true in today's day and age.").

6/ *Notice* at ¶ 3.

7/ *Multiple Ownership of Standard, FM, and Television Broadcast Stations,* Second Report and Order, 50 FCC 2d 1046 (1975), *recon.,* 53 FCC 2d 589 (1975), *aff'd sub nom., FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775 (1978).

8/ *Id.* at 1074-75. Most then-existing daily newspaper/broadcast combinations were grandfathered because the Commission found that "stability and continuity of ownership do serve important public purposes." *Id.* at 1078.

pioneering licensees who had well served the public interest.[9/] Nevertheless, the Commission determined that it would prohibit new daily newspaper/broadcast combinations in the hope that the prohibition would lead to increased local diversity of expression.[10/]

The U.S. Supreme Court relied on spectrum "scarcity" as the foundation upon which it affirmed the Commission's adoption of the daily newspaper/broadcast cross-ownership rule. The Court stated that "[t]he physical limitations of the broadcast spectrum are well known. . . . In light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential. . . ."[11/] Because broadcast spectrum was viewed as "scarce," the Court upheld the Commission's decision to allocate spectrum in a manner intended to promote diversity despite First Amendment considerations to the contrary. It follows that, if broadcast frequencies are no longer "scarce," the Commission lacks a foundation on which to retain the daily newspaper/broadcast cross-ownership rule.

9/ *Id.* at 1074-5.

10/ *Id.* at 1075.

11/ *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 799 (1978) ("*National Citizens Comm. for Broad.*"). Courts and commentators have recognized two types of spectrum scarcity: physical and economic. While the legality of the daily newspaper/broadcast cross-ownership restriction is rooted in physical scarcity, these comments review both physical scarcity (the availability of broadcast spectrum or similar substitutes) and economic scarcity (there are more would-be broadcasters than spectrum frequencies available). It is questionable, however, whether the Supreme Court still recognizes economic scarcity as a valid rationale for regulation. *See, e.g., Action for Children's Television v. FCC,* 58 F.3d 654, 673-4 n.8 (D.C. Cir. 1995) (Edwards, dissenting) ("Interestingly, in responding to [the] Government's argument that cable and broadcast are alike in that they both are beset by 'market dysfunction,' the *TBS* Court stated that 'the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence.'. . . Apparently, the Court is now prepared to abandon the *economic* scarcity theory." (internal citation omitted, emphasis in original)).

B. Because the Daily Newspaper/Broadcast Cross-Ownership Restriction Is Based on the Scarcity Doctrine, Spectrum Scarcity Must Be Examined by this Biennial Review.

1. Spectrum Scarcity Is an Outdated Concept Adopted in an Earlier Era.

"Scarcity" as a rationale for limiting the First Amendment rights of broadcasters was discussed early in the history of broadcast regulation. In upholding the enforcement of the Chain Broadcasting Regulations, the Supreme Court in 1943 looked at the "natural limitation upon the number of stations that can operate without interfering with one another."[12/] Stating that "[t]he facilities of radio are not large enough to accommodate all who wish to use them," the Supreme Court allowed the FCC to "choose from among the many that wish to apply" for the initial allocation of licenses by using as a limiting factor certain network affiliation contract provisions that were deemed to be inconsistent with the public interest.[13/]

The seminal decision on broadcast spectrum scarcity was decided more than 25 years later. In *Red Lion*, the Supreme Court upheld the FCC's personal attack rules as a valid exercise of Commission authority "[b]ecause of the scarcity of radio frequencies. . . ."[14/] The *Red Lion* Court recognized that advances in technology even at that time were leading to more efficient spectrum use, but concluded that "[s]carcity is not entirely a thing of the past,"[15/] implying that scarcity already was a less valid consideration in 1969 than it was in 1943. As it had in 1943, the

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12/ *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 213 (1943) (*"NBC"*) (footnote omitted).

13/ *Id.* at 216.

14/ *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969) (*"Red Lion"*).

15/ *Id.* at 396.

Supreme Court focused on the fact that there were fewer broadcast channels to allocate than there were applicants. Consequently, the FCC could "put restraints on licensees in favor of others whose views should be expressed on this unique medium"[16/] when it was in the process of allocating licenses among competing applicants or regulating licensees.

Both the *NBC* and *Red Lion* decisions rest on the Court's findings that there were fewer stations to *allocate* than there were applicants for those allocations, and that government involvement in the allocation of broadcast frequencies was necessary to avoid technical interference. Because the Commission was allocating bandwidth by initial license assignment, and because the existence of competing applicants caused demand to exceed supply, the Court found it permissible for the FCC to establish criteria to use both in its comparative hearings to decide among competing applicants and in its ongoing regulation of licensee conduct.

2. The Spectrum Scarcity Doctrine Has Been Criticized Because Broadcast Spectrum Allocation Is Not an Issue Today.

In contrast to the eras of *NBC* and *Red Lion*, the factual scenario today has changed. Virtually all television broadcast spectrum has been allocated to licensees and comparative hearings are a feature of the past. The Commission no longer is in the business of assigning television broadcast spectrum to competing applicants and judging their comparative qualifications as it was in the 1940s, 1950s, 1960s and 1970s. Instead, for broadcast television spectrum, the Commission is in the business of reviewing applications for the renewal, assignment and transfer of licenses allocated years ago.

16/ *Id.* at 390.

Furthermore, *NBC* and *Red Lion* discuss allocational scarcity in a world when television broadcasting was the only way that consumers could receive audio and video information and programming. Because the Commission no longer is in the business of allocating broadcast spectrum to initial licensees (or even in the business of conducting comparative renewals), and because consumers have numerous other options for receiving video information and programming, it is unsurprising that commentators and courts have questioned the vitality of the scarcity rationale.[17/]

Spectrum scarcity has, in fact, been under a cloud for over a decade. More than fourteen years ago the Supreme Court questioned the continued validity of the scarcity doctrine in the *League of Women Voters*:

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. . . . We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.[18/]

17/ Commissioners Ness and Tristani in their defense of the scarcity doctrine nevertheless recognize that scarcity is tied to frequency allocation. *See, e.g.,* Ness/Tristani Statement at 3 (quoting *Red Lion* "there are substantially more individuals who want to broadcast than there are frequencies to allocate. . . ." (citation omitted)).

18/ *FCC v. League of Women Voters of California*, 468 U.S. 364, 376 n.11 (1984) ("*League of Women Voters*") (citations omitted). In response, Commissioner Powell recently stated: "I submit that the time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today's communications marketplace. As far back as 1984, the Supreme Court indicated in the *League of Women Voters* case, that it would await 'some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.' I believe we should be getting those signal fires ready." Powell

(continued...)

Since the *League of Women Voters* case opened the door, numerous distinguished jurists and commentators have questioned the continued validity of the scarcity rationale.[19/]

Given the probative merit of both the sources and scholarship of the criticism, the Commission will abdicate its responsibility if it does not review the scarcity doctrine as part of this biennial review, as Commissioner Furchtgott-Roth has noted.[20/] The Commission simply cannot incant the words "spectrum scarcity" and think that its justification of continued regulation remains valid. As the D.C. Circuit said in *Tribune*, the Commission must conduct a thorough analysis of the factual underpinnings and legal justification for the spectrum scarcity rationale.

C. The Factual and Technological Predicates for the Scarcity Rationale Are Gone.

As so many parties have observed over the past few years in multiple venues, the media industry has exploded.[21/] The *NAA Petition* filed in 1997, for example, details the phenomenal growth that has occurred in many facets of the media since the daily newspaper/broadcast cross-ownership restriction was instituted in 1975:

18/ (...continued)
Speech at 3.

19/ *See, e.g., Notice,* Separate Statement of Comm. Furchtgott-Roth at 2 n.1. *See also* Section E, *infra.*

20/ *Notice*, Separate Statement of Comm. Furchtgott-Roth at 3 ("To be sure, a great deal of our existing regulatory scheme depends upon the validity of spectrum scarcity. That, however, is no reason not to undertake a thoughtful review of the matter. If the world around us has changed to such a degree that our past assumptions no longer make sense, then we must acknowledge that truth. We cannot stick our heads in the regulatory sands, hoping that no one will notice the eroded foundation of our rules.").

21/ *See, e.g.,* Powell Speech at 4.

- total number of licensed radio stations increased nearly 50 percent;
- total number of FM stations more than doubled;
- total number of licensed television broadcast stations up more than 50 percent;
- total number of independent television broadcast stations more than tripled;
- total household cable subscription up from 17 percent in 1975 to more than 66 percent now; and
- combined viewing share of cable networks up from 11 percent in 1975 to more than 30 percent now.[22/]

These numbers are even higher today.[23/] Parties may differ as to whether Commission policy has encouraged or discouraged the growth of media outlets, but no one can dispute that there are a multitude of media outlets serving consumers now that were unavailable more than 20 years ago.

Technology and ingenuity, moreover, never stop in their tracks. The media industry is anything but static, in part because the Commission continues to license new spectrum by auction and allow new spectrum uses. For example, the Commission recently auctioned Local Multipoint Distribution System ("LMDS") spectrum that can be used to provide consumers with multi-channel video programming in competition with over-the-air broadcasters and cable operators.[24/] Traditional "broadcast" spectrum also is expanding as stations experiment with

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22/ *See NAA Petition* at 17-38.

23/ *See, e.g.*, Powell/Furchtgott-Roth Statement at 8.

24/ *See, e.g., Rulemaking to Amend Parts 1, 2, 21, and 25 Of the Commission's Rules to Redesignate The 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services,* Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 (1997) at ¶ 170 ("LMDS has the potential to provide fixed video, voice, and data services, services that may be one-way or two-way. . . . we believe that the likelihood that LMDS can increase competition in either the local multichannel video or

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multi-casting and digital compression, technologies that may enable broadcasters to transmit multiple streams of programming over their allocated spectrum.[25/] These new technologies, along with others, have increased the amount of available broadcast spectrum, thus making broadcast spectrum relatively abundant today when compared to the amount of broadcast spectrum available in 1943, 1969 or 1975.

Further, even without the other changes in the media industry, the advent of the Internet alone has vastly increased diversity of expression. For the cost of a home computer and an on-line connection, Americans throughout the country are creating their own web pages on topics that are interesting and important to them. On-line "chat" rooms allow Americans to discuss virtually any topic imaginable with neighbors from all corners of the globe. Even those without the personal means to own a computer have access to the Internet through free kiosks at shopping malls, computers in schools and libraries, and the newest eating experience: the "cyber cafe."

The combination of new media, new technologies and the expansion of traditional broadcast outlets currently give speakers, listeners and viewers more options than ever before.[26/]

24/ (...continued)
local telephone exchange markets (or both simultaneously) is high . . . .").

25/ *See, e.g.,* Powell Speech at 5 ("TV stations now have the potential to produce at least four times the number of channels of programming that once were necessary to produce a single channel of analog programming and compression technology promises to expand this even further."). *See also* Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail,* 50 FED. COMM. L.J. 605, 634 (1998). ("If digital broadcasters offer multiple channels or data services in addition to traditional broadcasts, the number of program services available in a community will increase, carrying the potential to serve an even greater range of diverse and unique interests.").

26/ These new opportunities have, in fact, been recognized by some Commission
(continued...)

Spectrum scarcity no longer exists. Indeed, given the fact that in this spring's LMDS auction a significant number of licenses went unsold, all indications are that we now live in a world with excess spectrum in the context of initial allocation.[27/]

Technological advances and the expansion of traditional broadcast media demand that the Commission think analytically using current data in this proceeding. If it does so, it must conclude that the very foundation for the daily newspaper/broadcast cross-ownership rule has been swept away by the advance of technology.

D. Spectrum Is Indistinguishable From Other Economic Goods.

1. The FCC No Longer Allocates Broadcast Spectrum.

If spectrum scarcity ever was a valid rationale for restricting broadcaster First Amendment rights, that rationale was only appropriate when the Commission was in the business of allocating new broadcast licenses among competing applicants. As the Supreme Court observed in *Red Lion*: "Where there are substantially more individuals who want to broadcast than there are *frequencies to allocate,* it is idle to posit an unabridgeable First

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26/ (...continued)
officials. *See, e.g.*, Catherine J. K. Sandoval, Director, Federal Communications Commission, Office of Communications Business Opportunities, Address before the FCC's Auctions '98 Conference (June 24, 1998) (discussing communications opportunities open to small businesses that allow "virtual 'broadcasts' of sound to the global audience of the world-wide-web" without an FCC license).

27/ Of the 986 LMDS licenses available, 122 licenses remained unawarded at the conclusion of the auction. *See FCC Announces the Conditional Grant of 31 Local Multipoint Distribution Service Licenses*, Public Notice, DA 98-1361 (released July 8, 1998) at 1 n.1. Similarly, several companies have recently returned direct broadcast satellite ("DBS") permits to the FCC. *See* Chris McConnell & Paige Albiniak, *Washington Watch — Thanks but no thanks,* BROADCASTING & CABLE, June 15, 1998, at 28; Satellite, COMMUNICATIONS DAILY, June 25, 1998, at 10.

Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[28/] More recently, the Supreme Court cited "the scarcity of available [broadcast] frequencies *at its inception*" as support for "regulation of the broadcast media that are not applicable to other speakers. . . ."[29/]

The FCC is long past the point of allocating initial broadcast licenses and instead now serves the role of granting license transfers subject to sale in the open market. Since 1,870 broadcasting licenses changed hands last year, it is obvious that spectrum scarcity is not keeping new parties from obtaining broadcasting licenses and making their viewpoints heard.[30/] Spectrum is indistinguishable from other economic goods bought and sold in the open market. Since scarcity is a "universal fact" pertaining to all economic goods, it hardly forms a unique basis for restricting the First Amendment rights of broadcasters.[31/]

2. Human Ingenuity Has Led to Spectrum Abundance.

The proliferation of new media and media outlets that makes spectrum just another economic good is hardly surprising. Resource scarcity prompts human ingenuity to develop new technologies, and that has happened in the broadcasting world. As numerous jurists and

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28/ *Red Lion*, 395 U.S. at 388 (emphasis added).

29/ *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 2343 (1997) (emphasis added) (citations omitted). Despite assertions to the contrary, *Reno* in no way affirmed the current validity of the spectrum scarcity doctrine. *See, e.g.*, Powell/Furchtgott-Roth Statement at 12-13.

30/ Number provided by BIA Research Inc., Chantilly, Virginia. The number of licenses changing hands shows that broadcast spectrum is available to any party willing and able to pay the price who meets statutory requirements.

31/ *Telecommunications Research and Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) *("TRAC v. FCC")*.

commentators have noted, technological innovations have expanded media outlets to such an extent that broadcast frequencies cannot be considered scarce.[32/] The explosion in the number and type of media outlets, in fact, is consistent with a school of analysis that concludes the supply of any resource is not finite in any serious way. Epitomized by the late Professor Julian Simon, those analysts believe the intellect of man creates resources, and the intellect of man expands resources through technological and other means when "heightened scarcity" occurs.[33/] Professor Simon and other analysts appropriately urge governments and regulators to stay out of markets precisely so that "heightened scarcity" will prompt inventors and entrepreneurs to find new ways to fill a societal need.

That market process has worked in the broadcasting industry in particular, and with spectrum usage in general, supporting the treatment of spectrum no differently from other economic goods. Traditional broadcasters now face competition from digital broadcast service ("DBS") and increased cable television capacity and penetration, all due to technology advances in the video programming industry. Other new competitors, such as telephone companies, have entered the video programming market.[34/] Further, as Commissioner Powell has noted, digital convergence has blurred the lines between all communications medium.[35/]

32/ As Commissioner Powell has correctly noted, "[t]he fact is that spectrum is not really scarce. It may actually be infinite, dependent only on advances in technology that can make ever-increasing efficient use of it." Powell Speech at 5.

33/ Julian L. Simon, THE ULTIMATE RESOURCE 2 at 97-8 (Princeton University Press, 1996).

34/ Ameritech recently obtained its 35th cable television franchise in Michigan. *Metro Briefs — City approves cable TV competition,* THE DETROIT NEWS, June 5, 1998, at B2.

35/ Powell Speech at 4 ("The TV will be a computer. A computer will be a TV. Cable (continued...)

Spectrum usage generally also has been expanded by the commercialization of new technologies, for example, in the wireless telephony industry. Whereas in 1994 the Commission found that cellular systems in some markets had reached their then-current capacities, the Commission recognized that cellular spectrum scarcity prompted carriers to move to digital technologies such as code division multiple access ("CDMA") that allow for more efficient spectrum use.[36/] Indeed, as suggested by some commentators in the wireless industry context,

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35/ (...continued)
companies will offer phone service, and phone companies will offer video service."). One question not addressed by these comments, and one the Commission may need to address if it fails to revoke the daily newspaper/broadcast cross-ownership restriction, is "what is a newspaper?" What does the convergence of personal computer and television receiver say about consumer sources of information, and how does one define and distinguish those sources of electronic information to be regulated as to their ownership of media and those not so regulated? As Robert Samuelson has posited in Newsweek,

> Or suppose people can customize their papers electronically. You preselect what you want — say, six top national and global stories, four top local stories, two favorite columnists, seven stock prices, the baseball standings and your horoscope. It's zapped to your home and printed on 8-by-11 paper. Is this still a newspaper?

Robert J. Samuelson, *Down With the Media Elite!?*, NEWSWEEK, July 13, 1998, at 47.

36/ *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services,* Second Report and Order, 9 FCC Rcd 1411, 1471-72 (1994). This technological trend can be expected to continue, especially given the market incentive to maximize spectrum usage by those who paid for their licenses at auction.

technology makes it possible to "manufacture new spectrum nearly at will."[37] It is no less technologically possible to expand the usability of broadcasting spectrum.[38]

3. Congress Has Told the FCC to Auction Rather Than Allocate Spectrum.

Congress itself recognizes that spectrum is now just another economic good. In authorizing the auction of broadcast spectrum, Congress made it plain that the FCC should no longer be in the business of deciding even the initial allocation of who gets available spectrum.[39] Rather, Congress is letting the market allocate spectrum that is currently unallocated (such as broadcast spectrum returned after the transition to digital will be), just as it already allocates spectrum currently in licensee hands. Indeed, Congress' extension of broadcast license terms to eight years, and its elimination of the opportunity for competing applicants to challenge an incumbent broadcaster's license renewal, support the conclusion that broadcasting spectrum scarcity no longer is an issue for the Commission. These new provisions in the Telecommunications Act of 1996 are strong evidence that Congress no longer believes that spectrum is sufficiently "scarce" to warrant Commission oversight of license allocation.[40]

37/ George Gilder, *Auctioning the Airwaves* <http://homepage .seas. upenn. edu/ ~gaj1 /auctngg.html> as published in Forbes ASAP, April 11, 1994. Gilder discusses technologies that can scan through spectrum and determine which channels are in use and which are available. Available channels are then used to place wireless telephony calls. Gilder states that these technologies make the concept of exclusive spectrum licensing obsolete because they offer the possibility of bandwidth on demand.

38/ *See, e.g., Action for Children's Television*, 58 F.3d at 675 (Edwards, dissenting).

39/ *See* 47 U.S.C. § 309(j).

40/ Now that Congress has allowed the FCC to auction spectrum, the courts have been unwilling to allow auctioned licenses to be treated differently from other goods in bankruptcy. *See, e.g., In re: GWI PCS, Inc.*, Case No. 397-39676-SAF-11, Adv. No. 397-3492, slip op.

(continued...)

As the D.C. Circuit observed back in 1986:

> it is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor and capital are all scarce, but this, of itself, does not call for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resource. But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates resources to users without the need for government regulation.[41/]

Now that Congress has adopted a price mechanism as the tool for allocating spectrum, the Commission has no basis for continued scarcity-based regulation.

4. Arguments that Spectrum Is Somehow Different From Other Economic Goods Are Invalid.

Some have argued that broadcast spectrum is so fundamentally different from other economic goods that government regulation is required. Those arguments are unconvincing. For example, it has been suggested that broadcast spectrum scarcity can be distinguished from the scarcity inherent in other economic goods because broadcasting scarcity is "government created and government enforced."[42/] Spectrum, however, either is inherently scarce or it is not.

40/ (...continued)
(N.D. Tx. Apr. 24, 1998).

41/ *TRAC v. FCC*, 801 F.2d at 508 n.3 (citing Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959)).

42/ Tristani Speech at 2. George Gilder disputes the legitimacy of government regulation over spectrum. In a recent interview in which he suggests that the FCC abandon its regulatory role of licensing spectrum, Mr. Gilder stated that "spectrum is not a natural resource, it's a product of engineering." *Dumb Networks Needed — Futurist Attacks FCC As Managing Telecom Markets, Stifling Development,* COMMUNICATIONS DAILY, June 12, 1998, at 4.

The First Amendment prevents government from artificially "creating" scarce spectrum solely so it can regulate the speech of those who wish to purchase spectrum.[43/]

Moreover, the FCC enforces licensee uses of the broadcast spectrum no differently from how the government protects property rights in general. No one would argue that, because the government records real estate deeds and enforces landowner rights, or because government imposes land use restrictions through zoning, land is a unique economic good that requires a government agency to restrict land ownership and use in the interest of "diversity." There is nothing unique in the FCC's allocation and enforcement of broadcast licenses and licensee rights sufficient to support the restrictions on ownership. Indeed, initial land allocations were made by the government, just as initial license allocations were made by the FCC.

Similarly, the existence of "pirate" broadcasters does not show that spectrum is more scarce than other economic goods.[44/] Squatters that unlawfully infringe upon the property of landowners do not thereby make such property "scarce." Rather than evidence of scarcity, pirate broadcasters are nothing more than squatters and scofflaws encroaching on the rights of legitimate broadcasters.

Finally, the argument that broadcasting spectrum scarcity is unique because spectrum is "public property" also must fail. Even if licensees do not "own" their spectrum, their rights are no different from those of other interest holders, such as holders of mineral rights who have a

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43/ Commissioner Powell has cited Professor Tom Krattenmaker in observing that "the belief — or at least the assertion of a belief — in a scarcity theory exists because those who wish to continue broadcast regulation believe that some theory of unique scarcity must exist. Otherwise, broadcasters could not be controlled by the government — or its perception of the 'public interest.'" Powell Speech at 6.

44/ Ness/Tristani Statement at 22.

valid, enforceable interest in property even if they are not "owners." That does not mean, however, that mineral rights are so "scarce" that government may infringe on the constitutional rights of lessees. As some commentators have noted, the "public property" argument generally has been used simply as another way of articulating the scarcity argument, the notion being that because frequencies are scarce their use had to be licensed, and the licensing power was tantamount to public ownership of public property.[45/]

Today, when broadcast television licenses are no longer allocated by the Commission but instead are traded on the open market, there is nothing unique about broadcast spectrum that distinguishes it from other economic goods. The Commission cannot, therefore, continue to apply a lower level of First Amendment scrutiny to broadcasters based on the concept of spectrum scarcity.

E. Courts and Commentators Have Questioned the Validity of the Scarcity Doctrine.

When the Commission conducts its review of the validity of the spectrum scarcity rationale it must also consider the criticism levied against it. Numerous jurists and commentators have, in fact, questioned the rationale of spectrum scarcity. For example, shortly after the Supreme Court invited a review of the scarcity rationale, the D.C. Circuit in a decision written by Judge Bork said flatly that "[t]here is nothing uniquely scarce about the broadcast

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45/ Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899 (forthcoming Spring 1998) (manuscript at 912) ("*Robinson*").